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SUMMARY RECORD OF THE 534th MEETING

Held at Headquarters, New York,
on Thursday, 9 June 1994, at 10 a.m.

Chairman: Mr. MORÁN (Spain)

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INTERNATIONAL COMMERCIAL ARBITRATION: DRAFT GUIDELINES FOR PREPARATORY CONFERENCES IN ARBITRAL PROCEEDINGS (continued)

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The meeting was called to order at 10.15 a.m.

INTERNATIONAL COMMERCIAL ARBITRATION: DRAFT GUIDELINES FOR PREPARATORY CONFERENCES IN ARBITRAL PROCEEDINGS (continued) (A/CN.9/396/Add.1)

Chapter III, section A

1. Mr. LEVY (Canada) said that it was at the outset of the arbitral process, though not necessarily at the first preparatory conference, when the parties were still prompted by good intentions, that they should agree on the procedure to be followed. Generally, it was the party that was dissatisfied with the award which resorted to delaying tactics in order to impede its enforcement. He described a case in which the award had been decided in London and was to have been enforced in Canada, and where the dissatisfied party had gone so far as to question the constitutionality of Canadian federal legislation and had even attempted to appeal the case before the Supreme Court of Canada in order not to pay the award to the other party. In order to prevent such problems from arising at the close of proceedings, the Guidelines should include provisions that would make it possible to reduce to a minimum delays and costs incurred by the abuse of judicial process and to guarantee the finality of the arbitral award by prohibiting appeals and facilitating enforcement.

2. In most States which had adopted the UNCITRAL Model Law, intervention by courts was limited to specific cases, such as interim measures, appointment of arbitrators in certain circumstances, challenge and dismissal of arbitrators or challenge of their competence and application to set aside an award on specific grounds. In some jurisdictions, including Canada, the powers of a court of law could not be curtailed in the absence of specific legislation. In others, the parties could explicitly agree to limit their right to appeal in a court of law. In that instance, the limitations provided for in the UNCITRAL Model Law constituted a good basis. In some cases, however, a written agreement would have little effect, in particular in the common law countries, where even a "privative clause" did not constitute effective protection when a court was determined to intervene. However, an agreement between the parties could be of some use.

3. Perhaps the best way to guarantee the finality of the award was to adopt a law that limited court appeals aimed at setting aside the arbitral award. Thus, the Act relating to commercial arbitration in Canada had incorporated the UNCITRAL Model Law into Canadian legislation. He read out article 34 of that Act, which echoed article 34 of the Model Law and stipulated that an arbitral award could be set aside by the court only if the party making the application furnished proof that it was under some incapacity or that it had not been given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties.

4. For such instances, the Guidelines could provide for a form of estoppel - a written stipulation in which the parties would state that they waived any right to appeal, thereby preventing the dissatisfied party from attempting to delay

the arbitral procedure or enforcement of the award. A stipulation of that sort would have good chances of being valid, even in the absence of legislation governing the question.

5. Mr. GRIFFITH (Observer for Australia) recalled that article 1 of the UNCITRAL Arbitration Rules stipulated that disputes were to be settled in accordance with those Rules subject to such modifications as the parties might agree to in writing. If the parties explicitly accepted the decisions adopted during preparatory conferences and confirmed that agreement in writing, that could constitute a sort of waiver with respect to any future objection and prevent subsequent disputes. He proposed that a sentence should be inserted in paragraph 34 of the draft Guidelines to the effect that, since the purpose of preparatory conferences was to establish certainty, the parties should explicitly accept the decisions adopted during the preparatory conferences and sign a document recording their agreement.

6. Mr. TUVAYANOND (Thailand), responding to an observation made by the representative of the United Sates of America with regard to paragraph 36, proposed that the word "fundamental" should be added at the end of the last sentence of that paragraph, which would then read: "... as a result of a fundamental change in circumstances".

7. Mr. HOLTZMANN (United States of America), referring to the statement made by the representative of Canada, agreed that the courts should respect the arbitral process and that their opportunities for intervention should be reduced to a minimum. It was with some envy that he recognized that Canadian law authorized parties to waive their right to recourse or to appeal in advance. However, he did not believe that such a waiver could be applied during a preparatory conference. Such conferences were called by arbitrators for the sole purpose of spelling out exactly what procedures would be adopted, and it would be highly inappropriate for the arbitrators to ask the parties at that stage to waive their right to challenge their decisions or even to ask questions regarding the enforcement of the award. It should be assumed that at that stage the parties were acting in good faith and ready to abide by the award. It might be in one party's interest to waive its right, but not in the other's. The party that chose to refuse to waive its right would then find itself in the uncomfortable position of having either to reject the proposal or invitation of the arbitrators, no matter how harmless it was, or to accept for fear of arousing the hostility of the very same individuals who were responsible for settling the dispute. Therefore, while the principle had some merits, it did not appear to be applicable to a preparatory conference.

8. The observer for Australia had rightly noted that if decisions were taken during a preparatory conference and the parties agreed to them, it was wise to record that agreement. However, one must be careful in drafting a provision to that effect not to undermine the principle which held that the agreement of the parties was not necessary to establish procedures, a task which fell to the arbitrators alone.

9. Mr. ZHANG Qikun (China) said that he agreed with the representatives of Thailand and the United States of America that the reference to the "substance of the dispute" in paragraph 33 should be deleted. The decisions taken at

preparatory conferences could relate only to procedure. It was inconceivable that a decision on a substantive question could be taken at a preparatory conference in the absence of one of the parties. Once that reference was eliminated, the square brackets could be removed.

10. Mr. CHATURVEDI (India) said that he agreed with the views of the representative of the United States of America regarding the Canadian proposal to exclude various questions from the jurisdiction of the courts. It was not the purpose of preparatory conferences to settle such questions. They should be settled by the parties themselves or within the framework of the applicable international conventions. Like other countries, India applied certain procedures for the submission of cases to court and also the provisions of international conventions, in particular the 1958 New York Convention, which were very useful for the enforcement of awards. Those questions should be resolved within the framework of domestic law; in any case, courts would never agree to give up their prerogatives. It was therefore inappropriate to include renunciation of the right of appeal among the questions which could be taken up at preparatory conferences.

11. With regard to the Australian proposal concerning paragraph 33, he agreed with the representative of China that the purpose of preparatory conferences was to consider purely procedural questions and certainly not substantive questions, particularly if for any reason one of the parties was absent at the time a decision was taken. Only procedural questions which the parties had not previously taken up could be considered in that context. The consent of the parties was the very underpinning of all arbitral proceedings.

12. Mr. CHOUKRI SBAI (Morocco) said that the problem of the right of appeal was complex. The approach to that question differed from one legal system to another. In Morocco, there was a model law based on respect for the regime of arbitration. Decisions of arbitrators could not be contested, either by means of an objection or through the appeals procedure. There were only three exceptions. First, the decision could be reviewed in the event that new evidence or new documents were produced, or if the arbitration had been based on documents that were false, invalid, or had lapsed. That possibility of review was also highly restricted in common law. Second, a third party not involved in the dispute could contest the decision if it affected his interests. Third, an arbitral award could not be enforced automatically; the common law judge had to be asked to enforce it. It was that decision of the common law judge that was subject to appeal. The judge never had the right to decide on substance. He had to ensure that the arbitrators' decision was not contrary to public order, that it was not null and void from the standpoint of the law to which it referred and that the rights of the defence had been fundamentally respected. He could not amend the arbitrators' decision. Morocco had ratified the New York Convention on the Recognition and Enforcement of Arbitral Awards. Thus, the question of appeal was a thorny one: the solution varied from one country to another, and reference must also be made to the New York Convention in enforcing foreign decisions.

13. Mr. OLIVENCIA (Spain) said that the questions that could be taken up at preparatory conferences, which were a planning mechanism, should not relate to the substance of the dispute. However, there was another danger, and that was

that it would be possible to take up only procedural questions. Delegations had different views on that subject. Contrary to what had been said by representatives of the United States of America and China, some controversial questions such as the definition of issues to be taken up - what had to be proved, what the parties agreed on - were not solely procedural matters. Even if they did not constitute the substance of a case, they were linked to it, and certain aspects had to be established. That problem had a direct bearing on the question of the possibility of settlement (sect. III C) and defining questions and the order of deciding them (sect. III D). The question of what should be accepted by the parties - for example, that documents were authentic and valid - was not a procedural question but was important for the settlement of a dispute, and was the first thing on which the Commission must clearly define its position.

14. The difficult question of renouncing the right of appeal should not be taken up in the Guidelines. The Guidelines should be very clear for all legal systems within the limits authorized by domestic law. The representative of Morocco had made very pertinent comments in that respect. In Spain, it was a question which related to the most fundamental aspects of the rights of the defence and law and order. It was an extremely delicate question for Spain, and therefore his delegation was not in favour of including it in the text of the Guidelines.

15. Mr. CHATURVEDI (India) questioned whether the last sentence of paragraph 36 was really useful; he wondered why the adjectives "detailed" and "specific" had been used together.

16. Mr. TUVAYANOND (Thailand) said that his delegation did not entirely rule out the possibility of taking up substantive questions or even the question of the merits of the application at the preparatory conference, in so far as agreement on those questions could sometimes make it possible to accelerate the procedure or lead to a settlement of a dispute even before the arbitral proceedings began; however, all parties had to be present. Regarding renunciation of the right of appeal, he stressed that the parties always had the option of appealing in exceptional cases of ultra vires. Lastly, he felt that it would be useful to specify, at the end of paragraph 36, that a decision might have to be modified as a result of a "fundamental" change in circumstances.

17. Mr. ABASCAL ZAMORA (Mexico) said it was unrealistic to maintain that preparatory conferences should focus solely on form, because it was very difficult to determine where procedure ended and where substance began. The solution would be to delete paragraph 33 and to refer to the check-list, bearing in mind that that list was not exhaustive. In any event, questions relating to the substance or merits of a case should be handled very carefully.

18. Mr. GOH (Singapore) said that he would prefer it if section C included an indication that at a preparatory conference, the parties should, specifically decide to renounce their right of appeal. Arbitration was a choice made by the parties and they should abide by it, particularly since recourse procedures before courts involved expenses in addition to the already heavy costs of arbitration.

19. The CHAIRMAN, replying to the representative of Singapore, said that that was a delicate question because legal systems varied in different countries. He suggested that the Commission should take up paragraphs 37 to 39 and section A (Rules governing arbitral procedure) of chapter III (Annotated check-list of possible topics for a preparatory conference).

20. Mr. HUNTER (Observer for the International Council for Commercial Arbitration) said it was inconceivable that all the aspects in the check-list could be properly considered at the same stage and at the same conference. Items A (Rules governing arbitral procedure), B (Jurisdiction and composition of arbitral tribunal), J (Arrangements concerning written submissions), M (Language of proceedings) and P (Place of arbitration), for example, should be taken up at the very beginning of the procedure, while items E (Undisputed facts or issues) and L (Hearings) should be taken up at a much later stage. The various questions included under item L could be taken up only at a pre-hearing conference in the strict sense of the term. In order to guide inexperienced arbitrators, the Guidelines should contain information, either in the introduction to chapter III, or in the notes on each topic, or in both, concerning the stage at which the different items on the check-list should be taken up.

21. Mr. HOLTZMANN (United States of America) said that he supported the general comment made by the observer for the International Council for Commercial Arbitration without being as pessimistic. With regard to item A on the check-list, he felt that that subject should not be included in the agenda of a preparatory conference. His first objection was similar to that raised during the consideration of paragraphs 16 and 17 regarding modification of the arbitration rules agreed between the parties. The adoption of arbitration rules at that stage would necessarily mean applying some surgery to those rules, if only with respect to the modalities of the constitution of the arbitral tribunal, since the latter would have already been constituted. Moreover, where the parties had not agreed on arbitration rules, it might be assumed that they had done so on purpose, leaving it to the arbitral tribunal to establish the rules of procedure within the framework of the procedural law applicable to arbitration. It would also be difficult at that stage to adopt the arbitration rules of a particular institution, mainly because of the question of fees. Lastly, if it became clear that the parties could not agree on a set of arbitration rules, it would be very difficult for the arbitral tribunal to discontinue the discussion, as the secretariat proposed in the last sentence of paragraph 2, and it would not do so, for fear of creating dissensions between the parties or of appearing to be too authoritarian, unless the breakdown was complete, which meant risking the loss of a great deal of time.

22. Mr. OLIVENCIA (Spain), referring to paragraphs 37 to 39, said that the Guidelines ought to recommend that the agenda should be drawn up prior to the preparatory conference, that it should be the subject of prior consultations between the parties and that, except in special circumstances, the parties should adhere strictly to the agenda during the preparatory conference.

23. With regard to paragraph 39, his delegation reserved the right to speak on each of the topics covered in sections A to T when those topics were considered. For the time being, he wished to emphasize that the check-list of topics to be

considered at the preparatory conference could only be indicative: the topics would depend on the specific circumstances of the case, and more particularly on the phase of the proceedings in which the preparatory conference would be held. The Guidelines should clearly indicate to the parties that the choice of topics to be considered was subject to what was authorized by the applicable national law or by the arbitration rules which they had agreed to follow.

24. Mr. TUVAYANOND (Thailand) said that he agreed with the representative of Spain concerning the agenda. The agenda should be prepared in consultation with the parties, and no topic that was not on the agenda should be considered without the consent of all interested parties, even under the heading "Other matters".

25. Mr. ABASCAL ZAMORA (Mexico) proposed that the designation of an authority responsible for appointing the arbitrators should be added to the check-list of topics in paragraph 39. Even though the arbitral tribunal might already have been constituted at the time of the preparatory conference, it might become necessary to replace an arbitrator, and it was preferable to have decided beforehand how the replacement would be appointed. The UNCITRAL Arbitration Rules, which were widely used, also provided that such an authority could make a decision where an arbitrator withdrew and could be consulted on questions of costs. The authority could therefore play a major role in ad hoc arbitrations, particularly those carried out in accordance with the UNCITRAL Arbitration Rules.

26. The section on the choice of rules governing the arbitral procedure, on the other hand, did not appear to be indispensable. It was clear that where the parties had not agreed on such rules, it would be for the arbitral tribunal to decide which rules to apply. One argument, however, could be used to support the retention of that section: the fact that the Guidelines were mainly intended for parties and counsel who were unfamiliar with the issue that was being arbitrated.

27. Mr. LEVY (Canada) said that he shared the views expressed by the representative of the United States of America concerning the risks of raising with the parties themselves the question of the rules governing the arbitral proceedings. The Guidelines should contain no reference to the rules of other institutions.

28. Mr. CHATURVEDI (India) reminded the Commission that his delegation had suggested previously that the term "preparatory conference" should be replaced by "preparatory meeting". Similarly, he wished to suggest that the word "agenda" should be replaced by the word "topics".

29. In section A, the square brackets should be removed and the entire text retained. On the question of fees for the use of arbitration rules, which had been mentioned by the representative of the United States of America, the matter did not arise in the case of published rules, such as the UNCITRAL Arbitration Rules, which could be freely utilized and amended. The only rule which could be laid down was that the parties must be consulted beforehand on the topics to be considered during the preparatory conference. It should be for the arbitrators to make that decision. Similarly, the topics which had not been included in the

check-list could not be excluded if the circumstances of the case required that they should be considered, or if the parties or the arbitrators wished to consider them. At the end of section A, paragraph 2, the words "applicable procedural law" should be replaced by "applicable procedural law and rules". Finally, his delegation did not believe that the Guidelines should include the question of the designation of an authority responsible for appointing arbitrators, as the representative of Mexico had suggested.

30. The meeting was suspended at 11.40 a.m. and resumed at 12.10 p.m.

31. Mr. CHOUKRI SBAI (Morocco) said that he fully supported the views expressed by the representatives of Spain and Thailand concerning paragraphs 37 and 38. The agenda should be the object of preliminary consultations during which the arbitrators would also have the right to express their point of view and would permit the parties to express their views, thereby facilitating the arbitration process and saving time. Given the flexibility of that approach, the last sentence of paragraph 38 could be deleted. If it was decided to retain the sentence, however, then the phrase "if the arbitral tribunal considers it appropriate" should be deleted. The parties must decide for themselves which topics they wished to consider.

32. Mr. HUNTER (Observer for the International Council for Commercial Arbitration) said that, for the reasons already given by the representative of the United States of America, he was in favour of deleting section A of the check-list.

33. Mr. LOBSIGER (Observer for Switzerland) said that, while he understood the objections of the representative of the United States of America concerning section A, he nevertheless felt that the arbitrators should seek to determine whether the parties were still unable at that stage to agree on a set of arbitration rules. Consequently, section A should not be deleted in its entirety. The comments of the representative of the United States of America must, however, be taken into account.

34. If there was no agreement on procedural rules, it might be difficult to reach agreement on the other sections of the check-list, particularly section F, concerning documentary evidence.

35. Mr. TUVAYANOND (Thailand) said that, in his country at least, it was virtually inconceivable that an arbitration agreement would not specify the applicable arbitration rules. If it did contain such a gap, however, it was essential for the parties to agree on the rules to be applied. That was why his delegation did not favour deleting section A, which it would prefer to see amended to indicate not that the arbitrators should try to determine whether the parties wished to agree on a set of arbitration rules but that the parties should agree on such rules.

36. Mr. AL-NASSER (Saudi Arabia) suggested that the wording of paragraph 37 should be amended by adding to the end of the second sentence the words "after consultation with the parties to the arbitration on the topics to be included in the agenda" and by deleting the last sentence. His delegation supported the proposal by the representative of Morocco to delete the phrase "if the arbitral

tribunal considers it appropriate" in paragraph 38. With regard to section A, he was inclined to think, like the representative of the United States of America, that it should be deleted. He would not object to its retention, however, if the section contained a reference to general principles of law.

37. Mr. BONELL (Italy) said that section A should be retained, subject to minor modification. Indeed, it was appropriate at the preparatory conference stage to draw the attention of parties to the fact that if they had not already done so, they would soon have to identify, at the very least, the rules that would govern the arbitral proceedings and to define various other rules of procedure and substantive rules, and that failure to do so would result in such decisions being taken by the arbitrators.

38. However, as the parties seemed still to be outside any framework of institutional arbitration, it would be useless to select a set of arbitration rules of an institutional arbitration mechanism. Yet there were other rules, including the UNCITRAL Arbitration Rules, which could be extremely useful at the current stage. In that connection, paragraph 2 of section A should probably be amended so as not to give the impression that the parties had to engage in possibly lengthy discussions in order to agree on a set of arbitration rules. The terminology should also be amended to make it clear that regardless of the current situation, all existing binding provisions would apply as usual, since the task at hand was not the choosing of the lex arbitra but rather the defining of rules similar to the UNCITRAL Arbitration Rules, for example.

39. Mr. OLIVENCIA (Spain) said that he, too, favoured retaining section A for several reasons. Firstly, it was clear that the section dealt with a hypothetical case in which the parties had not agreed on arbitration rules. Therein lay the usefulness of the Guidelines. It was unrealistic to think that the parties had overlooked that aspect of arbitration; neglecting to spell out in the arbitration agreement what set of arbitration rules would govern the arbitral proceedings was not the result of an oversight.

40. Secondly, the problem of the applicable law had yet to be resolved, for even if the parties referred to a national law in their arbitration clause or agreement, the national law might not require the parties to mention any specific rules of procedure in the arbitration clause or agreement. For instance, Spanish law only required parties to agree in the arbitration agreement to submit their disputes to one or more arbitrators and to enforce whatever arbitral award was decided. It stopped short of providing for procedures. However, the parties were well advised to plan the arbitral proceedings from the outset and to settle in particular such issues as deadlines and the order in which memorandums and counter-memorandums would be filed, and so forth, in the absence of arbitration rules even though they had strictly adhered to the provisions of the arbitration clause or agreement requiring them to specify the applicable law.

41. Mr. GRIFFITH (Observer for Australia), referring to paragraph 39, said that there was a contradiction between the idea in the second sentence that the check-list was intended to be complete and the comment in the penultimate sentence that the list was not exhaustive. He nevertheless hoped that that

would not prevent the Commission from considering the merits of any additions to the check-list that he might propose.

42. If the suggestion of the observer for the International Council for Commercial Arbitration to retain section A was accepted, it must be clearly stated either in a chapeau that would be part of paragraph 38 or paragraph 39 or, preferably, in a separate paragraph, that matters included in the check-list were for illustrative purposes only and not mandatory.

43. Mr. CHOUKRI SBAI (Morocco) agreed with the representatives of Saudi Arabia and the United States of America and noted that the primary function of the arbitral tribunal was to review arbitration agreements before turning to the settlement of disputes. It must determine the scope of its powers concerning procedural matters, the law applicable to disputes, and so forth.

44. Section A should be retained because it provided for an exceptional situation in which the parties had forgotten to spell out the procedure to be followed during arbitration, thus giving rise to various problems, since each arbitral tribunal tended to adopt its own approach to a specific case. For example, if the parties did not make any express provisions on the matter, certain arbitral tribunals applied the law of the host country while others applied the law of the chief arbitrator.

45. As far as the applicable law was concerned, some arbitration rules stipulated that disputes would be settled in accordance with the arbitration agreement concluded by the two parties and with the provisions of the law specifically or implicitly selected by them. However, there might well be cases in which the parties, when concluding the arbitration agreement, were unable to agree on the procedure to be followed, the substantive nature of the dispute, etc. In such cases, they could hold consultations in order to agree on methodology, in other words, to select the applicable law or request a body to settle the dispute in accordance with the principles of justice, or else to agree on a settlement. That was why section A should be retained.

46. Mr. LOBSIGER (Observer for Switzerland) agreed that in certain cases, despite the existence of a legitimate arbitration agreement, the parties were unable to agree on the rules governing the arbitral proceedings. Sometimes the choice of the parties was not clearly expressed, while in other instances the validity of the choice of the parties could not be challenged. Under those circumstances, a preparatory conference ought to be able to settle the question of whether the selection of the parties was valid and possibly other questions as well; sufficient time should be set aside for that purpose. Accordingly, the first part of the first sentence under section A, which read "If the parties have not agreed on arbitration rules", should be retained.

47. Mr. HOLTZMANN (United States of America) said that adopting a set of rules was easier to talk about than to do. He would hesitate to recommend to the parties to a dispute that they should adopt the UNCITRAL Arbitration Rules during the preparatory conference in the event that they had not concluded an arbitration agreement because of the enormous difficulties inherent in extracting from those Rules the only provisions likely to be applicable at that stage.

Chapter III, section B

48. Mr. ZHANG Qikun (China) said that preparatory conferences afforded an opportunity to ask the parties whether they had divergent views regarding the jurisdiction and composition of the arbitral tribunal. Even when such conferences were not necessary, the arbitrators were supposed to inquire whether the parties, especially the defending parties, had any objections as to the jurisdiction or composition of the tribunal.

49. It should also be established as quickly as possible that there were no challenges to the jurisdiction and composition of the tribunal in order to prevent either party from raising such issues later as a ploy to delay the enforcement of the arbitral award.

50. Therefore, his delegation proposed deleting the square brackets in section B and considering the jurisdiction and composition of the arbitral tribunal as issues that had to be included in the agenda of the preparatory conference.

51. Mr. TUVAYANOND (Thailand) said that while he agreed with the representative of China that section B was useful, he would prefer to speak of the "mandate" rather than the "jurisdiction" of the tribunal because the questions of the applicable substantive law and whether or not the arbitral tribunal would be empowered to invoke equity, all of which were linked more to the tribunal's mandate rather than to its jurisdiction, had yet to be settled. Nevertheless, section B was necessary because it allowed either party to call attention, for example, to any irregularities it believed had occurred in the selection of arbitrators.

The meeting rose at 1.05 p.m.